



Judge Supreme Court of the United States

Justice Brandeis

Justice Cardozo

Justice Holmes

Justice Sutherland

Justice Taft

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

<i>Bauman v. Ross</i> , 167 U. S. 548	8
<i>Bedford, Town of v. United States</i> , 23 F. 2d 453	6
<i>Boston Chamber of Commerce v. Boston</i> , 217 U. S. 189	7, 8, 9
<i>Brown v. United States</i> , 263 U. S. 78	5
<i>Mayor and City Council of Baltimore v. United States</i> , decided February 9, 1945	5
<i>McCandless v. United States</i> , 298 U. S. 342	7, 8
<i>Monongahela Navigation Co. v. United States</i> , 148 U. S. 312	7, 9
<i>Nahant, Town of v. United States</i> , 136 Fed. 273	6
<i>Olson v. United States</i> , 292 U. S. 246	7
<i>Sharp v. United States</i> , 191 U. S. 341	8
<i>St. Louis v. Western Union Telegraph Co.</i> , 148 U. S. 92	7, 8
<i>United States v. Alderson</i> , 53 F. Supp. 528	6
<i>United States v. Certain Parcels of Land</i> , 54 F. Supp. 667	6
<i>United States v. Town of Nahant</i> , 153 Fed. 520	6
<i>United States v. Wheeler Township</i> , 66 F. 2d 977	6
<i>Wayne County v. United States</i> , 53 Ct. Cl. 417, affirmed. 252 U. S. 574	6

Constitution:

United States Constitution, Fifth Amendment	2
---	---

(1)



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1020

JEFFERSON COUNTY, TENNESSEE, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT*

**BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN
OPPOSITION**

OPINIONS BELOW

The opinions of the district court (R. 40-44) are not reported. The opinion of the circuit court of appeals (R. 49) is reported in 146 F. 2d 564.

JURISDICTION

The decree of the circuit court of appeals was entered on January 15, 1945 (R. 49). The petition for a writ of certiorari was filed on March 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTION PRESENTED

Whether the obligation to pay just compensation for permanently flooding a portion of a county road system is satisfied when adequate substitute road facilities are provided by agreement with the county and at the cost of the Tennessee Valley Authority, or whether there is an obligation to pay additional compensation because some of the affected roads did not need to be and were not directly replaced.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part, as follows:

nor shall private property be taken for public use, without just compensation.

STATEMENT

This action was instituted by the petitioner to secure a declaratory judgment as to its rights, if any, arising out of the flooding of certain county highways (R. 1-4). Both parties filed motions for summary judgment in the court below on the basis of the pleadings and affidavits (R. 17, 35, 38). The district court granted respondent's motion for summary judgment and dismissed the action (R. 44-45). The circuit court of appeals affirmed (R. 49).

The material facts are not in dispute. The respondent has constructed a dam known as Doug-

las Dam in Jefferson County, Tennessee. The reservoir created by this dam inundated a portion of the county and flooded or otherwise adversely affected approximately one hundred and twenty miles of county roads. (R. 20-21.)

Respondent assumed, as it still does, that the measure of its legal liability was neither the original cost nor the reproduction cost new of the affected roads, but was the cost of restoring the county road system to a condition in which it would serve the needs of the county equally as well as it did before the reservoir was constructed. Accordingly, it made a survey of the county road system for the purpose of determining which of the affected roads would have to be replaced after the completion of the reservoir and which of the roads would no longer serve a useful purpose and could therefore be abandoned. This was the practice which it had uniformly followed in similar situations. After negotiations with the proper officials of the county, a proposed relocation plan was drawn up under which the respondent would be required to do the construction work necessary to replace all roads for which there would be any continuing need after the completion of the reservoir. (R. 19-20.)

While the county agreed that the proposed plan of relocation was satisfactory and made adequate provision for all roads which would be needed after the filling of the reservoir, it refused to ex-

ecute a formal settlement contract unless permitted to reserve whatever rights it might have to recover additional compensation because of the flooding of that portion of the road system for which there would be no continuing need after the completion of the project and as to which the county would be relieved of its legal duty to construct and maintain the roads (R. 20, 32).

Respondent agreed to this reservation, and a contract was executed which provided in substance (1) that the respondent would at its own expense construct certain designated roads which it was agreed constituted all the roads for which there would be any need under reservoir conditions, and (2) that the county would abandon all roads affected by the reservoir and release the respondent from liability except that the respondent would indemnify the county against any future claims of the traveling public or of abutting landowners. The county expressly reserved the right to recover any additional compensation to which it might be entitled as a result of the taking of the roads which were not replaced (R. 6-11).

The road construction which respondent was required to perform under this contract has been satisfactorily completed at a cost of \$1,878,393, and the county now has a road system which is fully as adequate to discharge its responsibilities as that which it had before Douglas Dam was con-

structed. It has, however, eighty-four less miles of road to maintain, and the bridges and other structures constructed by the respondent will have much longer life than the structures they replaced. Accordingly, the county will save substantial sums in annual maintenance costs, and this money will be available to it for other highway improvements. (R. 22-23.) The county has been fully exonerated and saved harmless from any future burden of road construction or replacement at a cost to the Authority over five times as great as the original cost and nearly three times as great as the reproduction cost new of the flooded highways (R. 22, 38), but it contends that it should receive additional compensation on account of the flooded roads which did not need to be replaced and were not replaced (R. 4, 26).

ARGUMENT

1. The decisions of the federal courts have uniformly recognized that the only right arising from the taking of highway easements is a right of exoneration from the cost of constructing whatever substitute roads may be necessary. Just compensation to a county for roads flooded or destroyed is measured by the cost of making the necessary readjustments in its road system. *Brown v. United States*, 263 U. S. 78, 82-83; *Mayor and City Council of Baltimore v. United States*, decided February 9, 1945 (C. C. A. 4),

affirming *United States v. Certain Parcels of Land*, 54 F. Supp. 667 (D. Md.); *Wayne County v. United States*, 53 Ct. Cl. 417, affirmed, 252 U. S. 574; *Town of Nahant v. United States*, 136 Fed. 273 (C. C. A. 1); *United States v. Town of Nahant*, 153 Fed. 520 (C. C. A. 1); *Town of Bedford v. United States*, 23 F. 2d 453 (C. C. A. 1); *United States v. Wheeler Township*, 66 F. 2d 977 (C. C. A. 8); *United States v. Alderson*, 53 F. Supp. 528 (S. D. W. Va.).

The policy behind these decisions is clear. Roads have no market value. They are of value to a county only to the extent that they enable it to meet its obligations to its citizens. Neither the original cost nor the reproduction cost new of the roads destroyed bears any relation to the amount of the loss. The readjustment of its road system may cost the county substantially more or substantially less than the reproduction cost of the affected roads. If more, the county would not be made whole by a payment based on the reproduction cost of the flooded roads; if less, it would receive an unwarranted windfall. The soundness of this doctrine is illustrated by the present case. The original cost of all roads affected by the construction of the Douglas project was only \$341,439 (R. 22). The reproduction cost of these roads was \$671,564 (R. 22). The actual cost, and the reasonable cost, of readjusting the county road system, as performed and completed by respond-

ent, was \$1,878,393 (R. 22). If petitioner had been compensated for all of its flooded roads in accordance with the theory it now advances, i. e., on the basis of reproduction costs, it would have been paid only \$671,564, or over a million dollars less than the amount needed to make it whole.

2. Petitioner contends that the decision of the court below is in conflict with the principles enunciated in *Olson v. United States*, 292 U. S. 246; *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *McCandless v. United States*, 298 U. S. 342; *Boston Chamber of Commerce v. Boston*, 217 U. S. 189; and *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92 (Br. 15). It is asserted to be in conflict with *Olson v. United States*, *supra*, on the ground that "value is not diminished nor compensation reduced by any element resulting subsequently to or because of the taking" (Br. 6). It is petitioner's theory that the court cannot look at the situation which will exist after the taking to determine whether the county has been fully compensated for its loss. This contention is contrary to the well established rule applicable in all cases involving a partial taking. In such cases, the court always looks at the situation which will exist after the taking to determine the extent to which the owner has been damaged. If the use to which the land taken will be put increases the value of the remainder, the compensation to which the owner is entitled will be less than the value of the

land taken (*Bauman v. Ross*, 167 U. S. 548). So, also, if the use to which the land taken is put decreases the value of the remainder, the compensation to which the landowner is entitled is a sum greater than the value of the land taken (*Sharp v. United States*, 191 U. S. 341). The court looks at the situation before the taking and the situation after the taking and compares the two for the purpose of determining what will constitute just compensation. This is exactly what was done by the court below. A part of the county road system was flooded. The court compared the situation before the taking with the situation after the taking and determined that the county had been fully compensated by the construction work performed by respondent.

The decision of the court below is asserted to be in conflict with the decision in *McCandless v. United States*, *supra*, on the ground that "Value may reflect the use to which the property is presently devoted" (Br. 6). Surely that is exactly what the judgment in this case does reflect. The asserted conflicts (Br. 6-7) with *St. Louis v. Western Union Telegraph Co.*, *supra*, and *Boston Chamber of Commerce v. Boston*, *supra*, are equally baseless, for the court below recognized that highways are property within the meaning of the Fifth Amendment (*Western Union* case), and that "the question is what has the owner lost, not what has the taker gained"

(*Boston* case, p. 195). The decision below is based on the fact that the county has been fully compensated for its loss.

The theory on which petitioner contends that the decision of the court below conflicts with *Monongahela Navigation Co. v. United States*, *supra*, is nowhere stated by petitioner, and we are at a loss to perceive any basis for this contention.

CONCLUSION

The decision of the court below is in accordance with established principles of law. It is entirely consistent with the cases heretofore decided by this Court, and there is no conflict of decisions. It is respectfully submitted that the petition should therefore be denied.

CHARLES FAHY,
Solicitor General.

THOMAS J. GRIFFIN,
Solicitor,

CHARLES J. MCCARTHY,
Assistant General Counsel,
Tennessee Valley Authority.

MARCH 1945.